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No. 82-359

In the Supreme Court of the United States

OCTOBER TERM, 1982

INUPIAT COMMUNITY OF THE ARCTIC SLOPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to compensation, under the Fifth Amendment, for its aboriginal title trespass claims against third parties, which were extinguished pursuant to the Alaska Native Claims Settlement Act of 1971.

2. Whether the United States had a fiduciary duty, enforceable in the Court of Claims for money damages, to protect petitioner from third party trespasses on aboriginal title lands.

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-18a) is reported at 680 F. 2d 122.

JURISDICTION

The judgment of the Court of Claims was entered on June 2, 1982 (Pet. App. 1a). The petition for a writ of certiorari was filed on August 31, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

1. Petitioner is a recognized tribe of Eskimos inhabiting the Arctic or North Slope of Alaska.[1] The Slope includes

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[1] "The Arctic Slope is an area of 56.5 million acres " 'between the summit line of the Brooks Mountain Range and the shore of the Arctic Ocean, from north to south, and from the Canadian Border to Point Hope, from east to west.' " " Pet. App. 2a, quoting *Edwardsen* v. *Morton*, 369 F. Supp. 1359, 1363 n.1 (D.D.C. 1973), dismissed as moot, No. 2014-71 (Feb. 16, 1977) (citation omitted).

Prudhoe Bay, which is the site of extensive oil production in Alaska today. Prior to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.* (ANCSA), petitioner claimed aboriginal title to this land (Pet. App. 1a-2a).

Pursuant to Section 6(b) of the Alaska Statehood Act, 48 U.S.C. note prec. 21, authorizing the State to select for itself 100 million acres of "vacant, unappropriated, and unreserved," public lands, Alaska filed applications covering vast acres of the oil-rich North Slope during the 1960s. Before November 1966, the United States tentatively approved these selections and the State granted conditional leases to oil companies for $912 million. *United States* v. *Atlantic Richfield Co.*, 612 F. 2d 1132, 1134 (9th Cir.), cert. denied, 449 U.S. 888 (1980) (*ARCO*). The bulk of the trespasses of which petitioner is complaining here arose from the exploratory operations of oil companies acting under the authority of these leases. *Ibid.*; Pet. App. 3a.

Congress enacted ANCSA in 1971, having found (43 U.S.C. 1601(a) and (b)) "an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims," and that "the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation." Section 4 of ANCSA provides (43 U.S.C. 1603):

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both

inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

In exchange, Congress gave the Alaskan Natives collectively $962,500,000 and 40 million acres of land in fee simple. 43 U.S.C. 1605, 1611 and 1613(h); Pet. App. 4a. As its share of the award, petitioner received approximately $48 million and approximately 5 million acres of land (Pet. App. 5a).

In *ARCO, supra*, the United States, on behalf of petitioner, sued the State of Alaska and 140 private parties and companies involved in the effort to exploit North Shore petroleum for pre-ANCSA trespasses to native lands.[2]

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[2]Prior to the enactment of ANCSA, petitioner and others sued the Secretary of the Interior and three Department officials, alleging that they had facilitated allegedly wrongful transfers of land to Alaska and issued purported authorizations for third-party trespasses on lands claimed by petitioner. *Edwardsen* v. *Morton*, 369 F. Supp. 1359, 1362 (D.D.C. 1973), dismissed as moot, No. 2014-71 (Feb. 16, 1977). Subsequent to ANCSA, the court held that that legislation did not extinguish petitioner's trespass claims against the trespassers, claims for breach of fiduciary duty against the federal officials for permitting the trespasses, and claims for denial of due process in the approval of the land patents. *Id.* at 1378-1397. In settlement of those remaining claims, the United States agreed to initiate the *ARCO* litigation on petitioner's behalf. Pet. App. 5a.

Petitioner intervened in the ARCO litigation, arguing that ANCSA did not extinguish its trespass claims against third parties based on aboriginal title.

Affirming the district court, the court of appeals rejected the claims of the United States and petitioner (612 F. 2d at 1136):

> In short, when Congress said in §§ 2(a) and 4(c) of the Act, 43 U.S.C. §§ 1601(a), 1603(c), that it was settling "all claims," it meant just that. Congress intended to and did extinguish all Native trespass claims based on aboriginal title.

The court of appeals advanced an alternative ground for rejecting the plaintiffs' claims with respect to those entries that were made under federal authorization and conditional state leases (which comprised the bulk of the entries). Such entries were not even trespasses, the court held (612 F. 2d at 1135), because Section 4(a) of ANCSA, 43 U.S.C. 1603(a), was retroactive, extinguishing aboriginal titles "as of the dates of the prior conveyances and tentative approvals of state selections." However, the Ninth Circuit expressly did not reach the question presented by this case, *i.e.*, whether the Fifth Amendment requires compensation for the United States' extinguishment of petitioner's trespass claims (see 612 F. 2d at 1139).

2. Prior to the Ninth Circuit's decision in *ARCO*, petitioner filed this action in the Court of Claims, seeking compensation for the United States' alleged taking of petitioner's trespass claims. Pet. App. 6a-7a. Following final disposition of *ARCO*, the Court of Claims granted the United States' motion to dismiss and denied petitioner's motion for partial summary judgment. Pet. App. 1a-18a.

The court first held that since both petitioner and the United States were parties to the *ARCO* litigation, petitioner was collaterally estopped from challenging the Ninth

Circuit's holding in that case that the activities undertaken under authority of federal land patents and state leases, which were the bulk of all entries, were not trespasses by virtue of the retroactive effect of Section 4(a) of ANCSA, 43 U.S.C. 1603(a). Pet. App. 8a-9a.

The Court of Claims further held that, regardless whether the entered lands were covered by federal patents and state leases, none of petitioner's trespass claims based on aboriginal title constituted property protected by the Fifth Amendment (Pet. App. 9a-13a). Relying on this Court's decision in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), the Court held that because petitioner's aboriginal title was unrecognized, it was not compensable. "Unrecognized aboriginal title is 'a right of occupancy which the sovereign grants and protects.' *Tee-Hit-Ton*, 348 U.S. at 279. The Inupiats could use the land only to the extent that Congress protected their right to do so. Congress could protect or fail to protect this land as it saw fit." Pet. App. 11a. Accordingly, because petitioner's "right to sue for trespass was merely one aspect of the protection Congress provided for [petitioner's] aboriginal title" (Pet. App. 12a), its extinguishment also was not compensable.

The Court of Claims also rejected petitioner's contention that it was entitled to compensation for its claims based on the United States' alleged breach of fiduciary duty in failing to prevent the pre-ANCSA trespasses. Pet. App. 13a-17a. The court concluded (Pet. App. 13a) that since these claims, like the claims for the trespasses themselves, also were based on aboriginal title, they likewise were not protected by the Fifth Amendment. The Court further held that it lacked jurisdiction over these claims for breach of fiduciary duty in the absence of any statute or regulation mandating the payment of money. Pet. App. 13a-17a.

Finally, petitioner contended that the United States denied it due process by failing to give it notice or an opportunity to be heard on Alaska's application for land patents, that it had a claim for damages against the United States for this denial of due process, and that ANCSA took that claim. The Court of Claims rejected this contention on the ground that its jurisdiction does not extend to claims for money based upon the United States' alleged violation of the due process clause. Pet. App. 17a-18a.[3]

ARGUMENT

The decision of the Court of Claims represents the application of settled law to the facts of this case, and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review by this Court is not warranted.

1. While petitioner concedes (Pet. 3, 8) that Congress may extinguish aboriginal title without compensation, it argues (Pet. 9) that until such extinguishment "no one has a right to occupy or trespass on Indian land without the Indians' consent." Assuming this is a correct statement of the law, it is of no avail to petitioner here. The bulk of the entries of which petitioner is complaining were made under the authority of the federal land patents and conditional state leases. *ARCO, supra*, 612 F. 2d at 1135; Pet. App. 8a. As the court of appeals in *ARCO* correctly held (612 F. 2d at 1135), Section 4(a) of ANCSA, 43 U.S.C. 1603(a) (see page 2, *supra*), extinguished aboriginal titles retroactively, *i.e.*, "as of the dates of the prior conveyances and tentative approvals of state selections." Accordingly, even under

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[3]Petitioner does not seek this Court's review of the Court of Claims' resolution of that issue. Pet. 7 n.9.

petitioner's theory its aboriginal title had already been extinguished at the time of the alleged entries, which therefore were not trespasses. See 612 F. 2d at 1135.

In any event, petitioner's argument lacks merit even with respect to entries that were made in the absence of federal authorization or conditional state leases. Prior decisions of this Court foreclose petitioner's contention that its trespass claims based on aboriginal title were common law causes of action and therefore property protected by the Fifth Amendment.

In *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), this Court held that the United States was not required to pay compensation for taking timber from land in Alaska that the Indians held by unrecognized aboriginal title. In so holding, the Court described the nature of unrecognized aboriginal title (*id.* at 279) as

> mere possession not specifically recognized as ownership by Congress. * * * This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.[4]

Petitioner's presence on and use of the land, and the form and extent of the protection of that presence and use, thus

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[4]The Court quoted approvingly (348 U.S. at 281) from its previous decision in *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 347 (1941):

> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues."

were matters within Congress' exclusive authority and discretion. Specifically, petitioner's right to sue for trespasses by third parties was merely one aspect of petitioner's aboriginal title. As the Court of Claims held (Pet. App. 12a),

> [t]he right to sue for trespass is one component of the bundle of rights that aboriginal title provides but which Congress may grant, limit, or extinguish as it sees fit. When, as an incident to extinguishing the aboriginal title itself, Congress in the Settlement Act also extinguished the Indians' claims for trespass to the land possessed under that title, it made a political decision not subject to judicial reexamination. Congress' authority to extinguish aboriginal title without payment also authorized it without payment to extinguish the trespass claims based upon that title.

Petitioner's claim against the United States for the alleged taking of its trespass claims is based squarely on its aboriginal title,[5] and that part is no greater than the whole. Since Congress could extinguish petitioner's aboriginal title, it could also extinguish the trespass claims based on it without paying compensation therefor.

The cases on which petitioner relies did not involve aboriginal title, but dealt rather with statutory and vested property interests.[6] In particular, *Logan* v. *Zimmerman Brush Co.*, No. 80-5950 (Feb. 24, 1982) (Pet. 13), involved

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[5]The Court of Claims explained (Pet. App. 11a): "It was because of that [aboriginal] title that [the Inupiats] were on the land in the first place; and it was the interference with their possession of the land under that title that was the basis of their trespass claims."

[6]Petitioner correctly concedes (Pet. 13) that its claim "is not a statutory claim." Similarly, *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974) (Pet. 8), involved Indian interests protected by treaties. No treaty is involved here.

an employee's rights under a state fair employment statute, which this Court held created a form of property protected by the Due Process Clause of the Fourteenth Amendment.[7]

Petitioner's suggestion (Pet. 12-13 n.16) that its occupancy of aboriginal land was in the nature of a tenancy at will also is without merit. The court below correctly rejected this analogy because of "the special and limited nature of aboriginal title and the broad discretionary authority of Congress to extinguish such title upon whatever terms and conditions it deems appropriate" (Pet. App. 12a).

2. In the alternative, petitioner claims (Pet. 15-17) that it was entitled to compensation insofar as ANCSA "took" its asserted damages claims against the United States for breach of fiduciary duty in failing to prevent the pre-ANCSA entries. The Court of Claims correctly rejected this argument for the same reasons it rejected petitioner's claim for compensation based on the trespass claims themselves (Pet. App. 13a).

In addition, the court held that, even in the absence of ANCSA, the breach of trust claims could not be sustained for lack of a waiver of sovereign immunity (Pet. App. 13a-17a). This ruling is in full accord with *United States* v. *Mitchell*, 445 U.S. 535 (1980). There, this Court reaffirmed (*id.* at 538) that, in an action brought pursuant to 28 U.S.C. 1505, there must be a waiver of sovereign immunity, which cannot be implied but must be unequivocally expressed, and that, in the absence of such a clear congressional consent, the Court of Claims has no jurisdiction to entertain a suit against the United States. See also *United States* v. *Testan*, 424 U.S. 392, 399 (1976).

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[7]Contrary to petitioner's suggestion (Pet. 13), the issue in *Logan* did not arise out of the repeal of the statute (slip op. 2 n.1), but rather out of the state agency's failure to meet the statutory deadlines binding on it, resulting in its losing jurisdiction over the employee's charge.

The Inupiats, like the respondents in *United States* v. *Testan, supra*, 424 U.S. at 400, quoting *Eastport Steamship Corp.* v. *United States*, 372 F. 2d 1002, 1009 (Ct. Cl. 1967), "do not rest their claims upon a contract; neither do they seek the return of money paid by them to the Government. It follows that the asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " Petitioner admits (Pet. 13) that its third party trespass claims are not based on any statute or treaty. Nor has petitioner cited any statute imposing a duty on federal officials to protect it from third party trespasses on aboriginal title lands in Alaska.[8] A fortiori, there is no statute that creates a right to recover money damages from the United States. In the absence of any such legislation, the Court of Claims had no authority to award the damages sought by petitioner.

There is no merit to petitioner's suggestion (Pet. 16) that the government waives sovereign immunity by bringing suit on behalf of a native tribe, as the United States did in *ARCO, supra* (see pages 3-4, *supra*).[9] Only Congress can waive the United States' sovereign immunity; the prosecutorial activities and assertions of federal officials cannot. See *Munro* v. *United States*, 303 U.S. 36, 41 (1938).

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[8]These facts distinguish this case from *Mitchell* v. *United States*, 664 F. 2d 265 (1981), cert. granted, No. 81-1748 (June 7, 1982), in which the Court of Claims assessed damages against the United States for its alleged breach of statutorily-imposed fiduciary duties. Indeed, the Court of Claims relied (Pet. App. 13a-14a) on its decision in *Mitchell* in rejecting petitioner's claim for compensation for alleged breach of fiduciary duty here.

[9]This Court made clear in *United States* v. *Mitchell, supra*, 445 U.S. at 542-544, that the United States can incur limited trust responsibilities with respect to Native Americans, which are not enforceable in the Court of Claims, ~~445 U.S. at 542-544.~~

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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